No. 12412

In the United States Court of Appeals for the Ninth Circuit

HALESTON DRUG STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the court on petition of Haleston Drug Stores, Inc. (hereinafter called "Haleston" or "petitioner"), filed pursuant to Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151 *et seq.*), to review an order of the National Labor Relations Board. The Board's order (R. 33), which was issued in a proceeding under Section 10 of the Act, dismissed an unfair labor practice complaint (R. 5–11) that had been issued by the General Counsel of the Board upon charges filed by petitioner (R. 2–4). This Court has jurisdiction under Section 10 (f) of the Act, for petitioner transacts business in Portland, Oregon, within this judicial circuit.

STATEMENT OF THE CASE

I. Background: The prior representation proceeding before the Board

In October 1948, Haleston filed a petition with the Board, pursuant to Section 9 (c) (1) (B) of the Act, requesting that the Board determine whether employees at its four retail drug stores in Portland, Oregon, desired to be represented, for collective bargaining purposes, by Retail Clerks' International Association, Food and Drug Clerks, Local No. 1092, A. F. L. The petition was docketed as "Case No. 36–RM–26," and a hearing thereon was held before a hearing officer of the Board. (R. 67, 34–66.) At the hearing, the Union moved to dismiss the representation petition on the ground "that the operation of the Employer is not one which affects interstate commerce, and that, even if it does affect interstate commerce, then it would not effectuate the policies of the Act to exercise jurisdiction" (R. 67–68).

On April 15, 1949, the Board issued its decision and order in Case No. 36–RM–26. Upon the record formulated at the hearing, the Board made the following findings respecting Haleston's business (R. 68):

> The Employer-Petitioner, an Oregon corporation, operates four retail drug stores in Portland, Oregon, at each of which it sells conventional lines of drugs and cosmetics, operates a soda fountain, and prepares and sells medical prescriptions. During the period from January 1, 1948, to December 15, 1948, the Employer made purchases for resale totaling $189,157.39, of which approximately 30.15 percent was shipped to the Employer directly from points outside the State of Oregon. Approxi-

mately 60 to 75 percent of the purchases made within the State was of goods originating outside the State, having been purchased from warehouses engaged in interstate commerce including McKesson & Robbins, Upjohn Company, and Sharpe & Dohme. Sales during the same period totaled $308,011.21, all being made locally at the Employer's drug stores.

On these facts, the Board concluded that it would not "effectuate the policies of the Act to assert jurisdiction inasmuch as the Employer's business is essentially local in character." Accordingly, the Board ordered that Haleston's representation petition be dismissed. (R. 69.)

II. The initial stages of the instant unfair labor practice proceeding

On March 15, 1949, shortly before the Board had dismissed its representation petition, Haleston filed an amended unfair labor practice charge with the Board's Regional Director for the Nineteenth Region. This charge, docketed as "Case No. 36–CB–7," alleged that the Culinary Workers Alliance[1] was, in violation of Section 8 (b) (2) of the Act,[2] attempting to force Haleston to sign a collective-bargaining contract which contained illegal union security provisions. (R. 2–4.)

[1] Consisting of "Waitresses and Cafeteria Women's Local No. 305; Cooks and Assistants Local No. 207; Waiters Local No. 189; Bartenders, Card and Poolroom Workers Local No. 496; Hotel Service Employees Local No. 664; and Local Joint Executive Board of H. & R. E. I. A. and B. I. L. of A." (R. 5).

[2] This and other relevant sections of the Act are set forth in the Appendix, *infra*, pp. 54–65.

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Before investigation of the charge, pursuant to Section 10 (b) of the Act, was completed, the Board had entered its order dismissing Case No. 36–RM–26. Nevertheless, on completion of such investigation, the General Counsel of the Board, acting through the Regional Director and pursuant to Section 3 (d), issued an unfair labor practice complaint. (R. 5–11.) Thereupon, the respondent Union filed with the Board a motion to dismiss the complaint, for the reasons (R. 12):

> 1. That the employer involved is not engaged in an operation in commerce or affecting commerce.
>
> 2. That, even if it does affect interstate commerce, it would not effectuate the policies of the Act to exercise jurisdiction.
>
> See *In re Haleston Drug Store, Inc.* * * * Case No. 36–RM–26, April 15, 1949.

A Trial Examiner having been appointed in the case, the Board, pursuant to Section 203.25 of its Rules and Regulations,[3] referred the motion to him for action (R. 15). On August 15, 1949, the Trial Examiner granted the motion to dismiss (R. 16–17). His ruling was predicated on "the commerce allegations in the complaint," and on "official notice of the findings and conclusions of the Board" in Case No. 36–RM–26, "wherein the Board * * * concluded that 'it would not effectuate the policies of the Act to

[3] "The Trial Examiner designated to conduct the hearing shall rule upon all motions. * * * The Trial Examiner may, before the hearing, rule on motions filed prior to the hearing, and shall cause copies of his ruling to be served upon all the parties."

exercise jurisdiction' " over Haleston's business (R. 17).

Haleston filed a motion with the Trial Examiner, requesting reconsideration of the dismissal (R. 17–18). Haleston contended: (1) that the Trial Examiner "had no evidence before him at the time of making" his ruling; (2) that the Trial Examiner erroneously relied on Case No. 36–RM–26, for that case involved different parties and issues (R. 18). Attached to this motion was an affidavit (R. 19–21) containing "additional" evidence on the scope of Haleston's operations.

The General Counsel of the Board also sought reconsideration of the Trial Examiner's action, filing a request for review thereof with the Board (R. 21–23). The General Counsel contended that "the Trial Examiner erred (1) in failing to find that the Employer's operation affects commerce within the meaning of the Act, and (2) in refusing to exercise jurisdiction even though such jurisdiction exists in fact" (R. 23).

III. The Decision and Order of the Board sought to be reviewed

On October 31, 1949, the Board, after considering the motions of Haleston and of the General Counsel, and the entire record in the proceeding, affirmed the Trial Examiner's action and entered an order dismissing the complaint in the unfair labor practice proceeding, Case No. 36–CB–7 (R. 23–33).

The Board held that the Trial Examiner properly took official notice of the record and findings of the Board in the prior representation proceeding involving Haleston (R. 25). However, the Board went

on to consider "the additional facts which the Employer and the General Counsel offer to prove concerning the relationship of the Employer's business to commerce," and found that (R. 25–26):

> The amounts of the various transactions differ quantitatively from those which appear in the record of the representation proceeding. Nevertheless they still show no more than that the Employer operates a chain of retail drug stores in Portland, Oregon, making substantial out-of-State purchases but selling all of its merchandise locally. That is precisely the situation that presented itself in the representation case * * *.[4]

The Board then considered the General Counsel's contention that, once he has issued an unfair labor practice complaint, the Board is without discretion to dismiss the complaint "solely because it believes that to assert jurisdiction would not effectuate the policies of the Act" (R. 26–27). After a careful and exhaustive analysis of the Board's functions under the original and amended Acts, and of the relevant legislative history of the amended Act (R. 27–31), the Board rejected this contention. It concluded that the provisions of Section 3 (d) of the amended Act, which created the independent office of General Counsel and vested the General Counsel with final authority "in respect of the investigation of charges and issuance of complaints under Section 10," did not deprive the

[4] The Board added (R. 25–26, n. 4): "The fact that the Employer makes an unspecified quantity of sales to transients from out of the State who may be staying at the hotels in which its stores are located does not establish a substantial volume of out-of-State sales sufficient to require us to reverse our earlier finding."

Board of its power to dismiss a complaint for policy reasons (R. 32).

On the facts of this case, the Board further concluded that it was proper to exercise such power here, for retail drug stores are "essentially local operations" (R. 26), and therefore "interruption of the Employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce" (R. 33). Accordingly, the Board, like the Trial Examiner, dismissed the complaint on the ground that it would not effectuate the policies of the Act to assert jurisdiction over Haleston's business (R. 24, 33).

ARGUMENT

INTRODUCTION

The principal question here is whether, after an unfair labor practice complaint has been issued in a case involving an enterprise which affects commerce within the meaning of the Act,[5] the Board has discretionary authority to decline to assert jurisdiction if it concludes that this course would best effectuate the policies of the Act. We shall show (pp. 9–43, *infra*)

[5] Although petitioner devotes one-half of its brief (Br., pp. 4–12) to a demonstration that Haleston's operation is, as a matter of law, subject to the Board's jurisdiction, it concedes at the outset that the Board so found. Thus petitioner states (Br., p. 2): "After the hearing, the Board held that *even though the Petitioner's operations were in commerce or affecting commerce*, it did not effectuate the policies of the Act to take jurisdiction. * * *" [Emphasis added.] Petitioner's concession is correct for, though the Board's decision does not specifically recite that Haleston's operations are covered by the Act, the basis of such decision necessarily presupposes that this is so. See also, pp. 43–44, *infra*.

that the Board is vested with this authority, and that it may properly be exercised where, as here, the Board has found that "interruption of the Employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce" (R. 33).

There is also presented the subsidiary question of whether the Board was reasonable in concluding, from the facts of this case, that the relation of petitioner's business to commerce was "remote and insubstantial." We submit that this question is not subject to judicial review (pp. 43–49, *infra*), but that, in any event, the Board's determination was reasonable and proper (pp. 49–53, *infra*).[6]

[6] Petitioner, in this Court, appears to have abandoned the contention, urged before the Board (R. 18), that the Trial Examiner erred in taking official notice of the facts found by the Board in the prior representation proceeding involving Haleston. The Board's rejection of this contention (R. 24–25) is overwhelmingly supported by judicial authority. See Davis, *Official Notice*, 62 Harv. L. Rev. 537; *U. S.* v. *Pierce Auto Lines*, 327 U. S. 515; *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 204; *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548, 561–562; Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1001, *et seq.*), Section 7 (d).

It is significant, moreover, that the Board did not rest solely on the evidence in the prior representation case. The Board went on to consider the additional facts which petitioner and the General Counsel offered to prove, and, on the basis of those facts alone, concluded that Haleston's operations were essentially local (R. 25–26). That the Board assumed the truth of these facts, without having them proved in an adversary hearing, creates no procedural problem (cf. Pet. Br., p. 3). The Union's motion to dismiss the complaint (R. 11–12) was analogous to a motion to dismiss in a judicial proceeding. Courts consistently, when passing upon the legal sufficiency of the latter type of motion, assume without further proof the validity of the facts pleaded.

Point I

The Board has discretionary authority to dismiss an unfair labor practice complaint, even though the operations affect commerce, if it finds that a dismissal would best effectuate the policies of the Act

A. The Board had such authority under the original Act

The original National Labor Relations Act (49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*), instead of conferring "private rights," granted only rights "in the interest of the public" to be protected by "a public procedure, looking only to public ends."[7] The Board, a "single paramount administrative or quasi-judicial authority" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 15), was vested with exclusive primary jurisdiction to protect these rights and "to give effect to the declared public policy of the Act." *Nat'l Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362. Thus Section 10 (a) of the Wagner Act provided that:

> The Board is *empowered,* as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise. [Emphasis added.]

For the Board to administer the provisions of the statute so as to give effect to its declared public policy,

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[7] *Agwilines, Inc.* v. *N. L. R. B.*, 87 F. 2d 146, 150–151 (C. A. 5). See also *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265–269; *Nat'l Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362–364.

Congress "reposed in the Board complete discretionary power to determine in each case whether the public interest requires it to act." *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), cert. den., 314 U. S. 693. The Board's unfair labor practice jurisdiction was "not to be exercised unless in the opinion of the Board the unfair labor practice complained of interferes so substantially with the public rights created by Section 7 as to require its restraint in the public interest" (Ibid.).[8] This was evidenced by the language of Section 10 (a) which "empowered" rather than "directed" the Board to prevent unfair labor practices, and by that of Section 10 (b) which read: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, * * * *shall have power* to issue * * * [a] complaint." [Emphasis added.]

Moreover, when the Board had exercised its jurisdiction and found that unfair labor practices were committed, it was entrusted with broad discretion to determine what remedy would effectuate the policies of the Act.[9] Finally, the statute left it to the Board's

[8] See also, *N. L. R. B.* v. *Walt Disney Products*, 146 F. 2d 44, 48 (C. A. 9), cert. den., 324 U. S. 877.

[9] Section 10 (c), insofar as material, read as follows: "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board * * * shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

discretion to determine whether or not to seek enforcement of its unfair labor practice orders in the courts.[10]

In short, as the Board concluded here (R. 28), the original Act permitted the Board "to make policy determinations at every stage of [an unfair labor practice] proceeding." It is significant, too (see pp. 37–41, *infra*), that such permissive power with respect to unfair labor practices was accompanied by an equally comprehensive discretion with respect to the representation provisions of the statute.[11]

It is not open to question that the Board, under this statutory scheme, could, for reasons of policy or for other reasons, decline to issue an unfair labor practice complaint.[12] It is equally clear that, after a complaint

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See also, H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24; S. Rep. No. 573, 74th Cong., 1st Sess., p. 15; *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194–195. *Cf. Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 46–47.

[10] Section 10 (e) of the Act provided that: "The Board *shall have power* to petition any circuit court of appeals of the United States * * * for the enforcement of such order * * *." [Emphasis added.] See also, *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; *N. L. R. B.* v. *Sunshine Mining Co.*, 125 F. 2d 757, 761 (C. A. 9).

[11] Section 9 (c) of the original Act provided that: "Whenever a question affecting commerce arises concerning the representation of employees, the Board *may investigate* such controversy * * *." [Emphasis added.] See also, *Inland Empire* v. *Millis*, 325 U. S. 697, 706–707; *N. L. R. B.* v. *A. J. Tower Co.*, 329 U. S. 324, 330–331; *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485, 491.

[12] *National Labor Relations Act*, Section 10 (b); *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18–19; *N. L. R. B.* v. *Barrett Co.*, 120 F. 2d 583, 586 (C. A. 7); *Jacobsen* v. *N. L. R. B.*, 120 F. 2d 96, 99–100 (C. A. 3); *N. L. R. B.* v.

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had been issued, the Board could dismiss the complaint without determining the existence of unfair labor practices, if in its opinion the policies of the Act would best be served thereby. Thus, the Supreme Court, in the *Indiana & Michigan Electric Co.* case,[13] specifically held that (318 U. S. at 19):

> The Board might properly withhold *or dismiss* its own complaint if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process. [Emphasis supplied.]

Furthermore, the Board, throughout the life of the original Act, dismissed complaints for a variety of other policy reasons, and the courts consistently recognized that the Board—as an incident of its quasi-judicial power to determine whether unfair labor practices have been committed and whether the public interest required their vindication—possessed the discretion to make such decisions.

For example, in *Godchaux Sugars, Inc.,* 12 N. L. R. B. 568, 576–579, the Board, having found that respondent had entered into a proper settlement agreement, dismissed the complaint on the ground that the policies of the Act would best be served by giving effect to the agreement and refraining from

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Nat'l Broadcasting Co., 150 F. 2d 895, 899 (C. A. 2); *Anthony* v. *N. L. R. B.*, 132 F. 2d 620 (C. A. 9); *Progressive Mine Workers* v. *N. L. R. B.*, 3 Labor Cases, Par. 60, 133 (C. A. D. C.); *White* v. *N. L. R. B.*, 9 L. R. R. M. 657 (C. A. D. C.).

[13] *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9.

consideration of the alleged unfair labor practices.[14] Passing upon the propriety of this type of determination, the Court of Appeals for the Sixth Circuit concluded that since the Board's "function is to be performed in the public interest and not in vindication of private rights [, the] Board is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned."[15]

In *Consolidated Aircraft Corp.*, 47 N. L. R. B. 694, 706–707, where the charging party had ignored the grievance and arbitration machinery established by a collective bargaining contract, the Board dismissed those portions of the complaint which alleged a refusal to bargain and the discriminatory discharge of certain employees, holding that the exercise of jurisdiction in such case would not "effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining.'"[16] Similarly, in *Timken Roller Bearing Co.*, 70 N. L. R. B. 500, 501, where the union had previously submitted the matter to arbitration as provided for by collective bargaining contract, the Board dismissed the complaint insofar as it alleged that respondent's unilateral issuance of

[14] See also, *Shenandoah-Dives Mining Co.*, 11 N. L. R. B. 885, 887–888; *Wickwire Bros.*, 16 N. L. R. B. 316, 325; *Midwest Piping and Supply Co.*, 63 N. L. R. B. 1060, 1074–1075.

[15] *N. L. R. B.* v. *Federal Engineering Co.*, 153 F. 2d 233, 234. See also, *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248, 253–255; *N. L. R. B.* v. *General Motors Corp.*, 116 F. 2d 306, 311–312 (C. A. 7).

[16] The Board issued an order as to the remainder of the complaint, which was enforced with modification by this Court. *Consolidated Aircraft Corp.* v. *N. L. R. B.*, 141 F. 2d 785.

the "Employees' Manual" constituted a refusal to bargain. The Board stated (p. 501): "it would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings." These cases are merely an application of the holding of this Court, in the *Walt Disney* case,[17] that the question of whether "the grievance and arbitration procedures established in a prevailing collective bargaining agreement" will preclude the Board from finding that unfair labor practices have been committed is within the "discretionary power" of the Board.

Again in *Allis-Chalmers Mfg. Co.,* 72 N. L. R. B. 855, the Board, having found that the company and the union had during the pendency of Board proceedings entered into a collective bargaining contract, dismissed a complaint alleging refusal to bargain for the reason that, in view of the Board's heavy case load and budgetary limitations, "the larger purpose and policy of the Act would not be effectuated by * * * proceeding further."[18] And in *Brown & Root, Inc.,* 51 N. L. R. B. 820, the Board dismissed a complaint against certain construction firms engaged in the erection of a Naval Air Training Center, on the ground, *inter alia,* that the assertion of jurisdic-

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[17] *N. L. R. B.* v. *Walt Disney Productions*, 146 F. 2d 44, 47–48, cert. den., 324 U. S. 877. Cf. *Int'l Bro.* v. *Int'l Union*, 106 F. 2d 871, 874–876 (C. A. 9); *N. L. R. B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C. A. 9).

[18] Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 776.

tion over the operations of respondents would not effectuate the policies of the Act.[19]

The *Brown & Root* case is particularly significant, for it shows that one of the reasons which led the Board to conclude that an assertion of jurisdiction would not effectuate the policies of the Act was the nature of the employer's business.[20] *Brown & Root* therefore parallels the instant case, wherein the Board, as it had done in the prior representation proceeding, dismissed the complaint for the reason that, "since interruption of the Employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce" (R. 33), it would not effectuate the policies of the statute to assert jurisdiction.

There was no doubt under the original Act as to the propriety of the Board's taking the factor of the effect

[19] Additional instances where the Board dismissed a complaint for policy reasons are: *Pacific Plastic & Mfg. Co.*, 68 N. L. R. B. 52, 54 (discriminatory discharge allegation of complaint dismissed because employee unavailable as witness and had failed to advise Board of his whereabouts); *The N and G Taylor Co.*, 21 N. L. R. B. 1162, 1167–1168 (complaint dismissed when it appeared that employer corporation had been dissolved, its operations discontinued, and the union had ceased activities as a labor organization). Likewise, for reasons of administrative policy, the Board often issued no findings or order where a respondent had complied with the recommendations of an Intermediate Report to which no exceptions were filed. Cf. *Pennsylvania Greyhound Lines*, 13 N. L. R. B. 28, 31–32.

[20] The explanation for the decision is that the "building construction industry" was involved (*Brown Shipbuilding Co.*, 57 N. L. R. B. 326, 328, n. 4), an industry "over which the Board does not customarily assert jurisdiction." *Johns Manville Corp.*, 61 N. L. R. B. 1, 2.

on commerce into consideration, before determining whether or not to proceed to a decision on the merits. Nor was there any doubt that the Board, in dismissing a complaint for the policy reason of remote effect upon commerce—as when it dismissed for any of the other policy reasons described (pp. 12–14, 15, n. 19, *supra*), or because the record failed to establish a violation of the statute—was exercising its quasi-judicial power to decide whether unfair labor practices had been committed and whether the public interest required redress thereof. Thus, Section 1 of the Wagner Act admonished the Board, as does indeed the amended Act (see p. 37, *infra*), "to eliminate the causes of certain *substantial* obstructions to the free flow of commerce." [Emphasis added.] In amplifying this mandate, the Supreme Court declared:[21]

> Where the employees are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a *substantial manner* is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority. *The justification for the exercise of federal power should clearly appear* * * *. But the question in such a case would

[21] *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 223–224.

> relate not to the existence of the federal power but to the propriety of its exercise on a given state of facts. [Emphasis added.] [22]

This statement reveals specific recognition by the Court of the Board's authority to decline, for the policy reason of remote effect upon commerce, to assert jurisdiction even though it existed in the constitutional sense, and of the fact that this authority was no different from the Board's power to refuse, for some other policy reason, to find an unfair labor practice though the record would have supported such finding.

In sum, it is abundantly evident that, under the original Act, the action taken here would have been within the Board's authority. The Board, notwithstanding the issuance of a complaint and the existence of legal jurisdiction, had power to conclude, for the reason that petitioner's business only remotely affected commerce, that the purposes of the Act would best be served by dismissing the proceeding.

The *Jacobsen* case,[23] relied on by petitioner (Br., p. 15), does not hold to the contrary. There the Board had issued a complaint, held a hearing, and entered a decision and order finding unfair labor practices and directing that they be remedied. Four years later, the Board vacated its original decision and order and dismissed the complaint, for the reason that (120 F. 2d at 98–99):

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[22] Cf. *N. L. R. B.* v. *Eanet d/b/a Parkside Hotel*, 179 F. 2d 15, 17–18 (C. A. D. C.).

[23] *Jacobsen* v. *N. L. R. B.*, 120 F. 2d 96 (C. A. 3), setting aside and remanding *Protective Motor Service Co.*, 21 N. L. R. B. 552.

> We are of the opinion that the facts set forth in the record are not sufficiently developed to afford a basis for determining whether or not the operations of the respondent affect commerce, within the meaning of the Act. * * * In view of the long period of time which has elapsed since the filing of the charges and the nature of the proceedings heretofore had, the Board, acting within the discretion granted it by Section 10 of the Act, does not deem it advisable to reopen the record upon this point.

The employees who had filed the unfair labor practice charges thereupon requested the Board to reopen the case and permit them to introduce additional evidence. When the Board denied this request, they petitioned the Court of Appeals to review the Board's dismissal of the complaint and to direct the Board to take further evidence on the commerce question.

The Court, although admitting that the Board had discretion to withhold a complaint (p. 100), went on to rule (p. 101) that: "the Board having issued its complaint and proceeded to hearings, had the duty to decide in limine whether or not the operations of the *Protective Motor Service Company* affected commerce within the meaning of the act, and in our opinion it was error for the Board not to do this." The Court also held (p. 101) that the Board's refusal to receive additional evidence on the issue of interstate commerce was "an abuse of discretion." Accordingly, the Court set aside the Board's order dismissing the complaint, and remanded the case to the Board with directions "to reinstate the complaint, to allow the petitioners a reasonable opportunity to

present the evidence referred to in their petitions, and to determine the issue of interstate commerce, and if it be found that the operations of *Protective Motor Service* do affect commerce within the purview of the act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto" (*Ibid.*).

This language, considered in the light of the precise problem before the Court, does not hold that the Board, under the Wagner Act, lacked authority to dismiss an unfair labor practice complaint for sound policy reasons. The Board had not, as here, determined, on the basis of an adequate record of commerce facts, that the assertion of jurisdiction would not effectuate the policies of the Act. Instead, it "took inconsistent positions. It stated that the record did not afford a basis for determining whether the operations of [the employer] affect commerce within the meaning of the act and then, in an exercise of discretion, refused to receive additional evidence upon this very pertinent issue" (pp. 100–101). Consequently, the Court merely decided that, under these circumstances, there "was not sufficient reason" (p. 101) for the Board's refusal to decide the merits. In other words, the Court held that the Board could not avoid consideration of the merits through a capricious refusal to decide, or take material evidence on, the essential preliminary question of its own jurisdiction. See *Note,* 63 Harv. L. Rev. 522, 523–524. The Court did not decide that the Board is precluded from withdrawing its process where, as

here, it did determine, upon a consideration of all material facts, the essential preliminary question of the effect on commerce and did indicate clearly in making its finding "that it has exercised the discretion with which Congress has empowered it" (*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197)—thereby establishing that there was "sufficient reason" for its action.[24]

[24] The Court's direction to the Board to determine whether unfair labor practices had been committed and to issue an appropriate order in respect thereto is consistent with the above analysis. Since there was nothing in the record which indicated that the Board had a valid policy reason for declining to decide the merits, the Court properly concluded that, if the Board found that the conduct charged affected commerce, the Board would, under these circumstances and in accordance with its applicable standards, proceed to determine whether unfair labor practices had occurred. This is precisely what the Board did on remand. *Protective Motor Service Co.*, 40 N. L. R. B. 967.

The validity of the above analysis is further shown by the excerpt from the *Newark Morning Ledger* case quoted in the text (p. 10, *supra*). This case was decided by the same judges who decided *Jacobsen*, the two decisions being a month apart. It is highly improbable that a court which held that, under the language of Section 10 of the Wagner Act, the Board could refuse to exercise its jurisdiction unless in its opinion "the unfair labor practice complained of" is so substantial "as to require its restraint in the public interest" would, one month later, so narrow the same statutory provisions as to confine this authority to situations where a complaint has not yet issued (120 F. 2d at 100). Obviously, the preliminary investigation of the charge, on the basis of which a complaint is issued, does not always reveal every fact relevant to a determination of whether the public interest requires restraint of the unfair labor practice. See also, *N. L. R. B.* v. *Philips Gas & Oil Co.*, 141 F. 2d 304, 306 (C. A. 3), in which the same court acknowledged the Board's authority to refuse to find unfair labor practices as a matter of discretion.

B. The amendments to the original Act did not eliminate the Board's prior discretion to dismiss a complaint for policy reasons

Title I of the Labor Management Relations Act (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151 *et seq.*), which amended the original National Labor Relations Act, provided for "a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate * * *." *Act, as amended,* Section 3 (d). Section 3 (d) further provides that the General Counsel:

> shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.[25]

Aside from this change, and certain modifications in Section 10 which conferred a limited jurisdiction on the federal district courts to grant preliminary injunctive relief against unfair labor practices,[26] there is "nothing in either the text or the history of the

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[25] The Board has delegated to the General Counsel a number of other functions, including "full authority and responsibility" over the preliminary stages of representation proceedings under Section 9 (c) (1). See *Memorandum Describing Statutory and Delegated Functions of the General Counsel*, 13 F. R. 654–655; 15 F. R. 1088–1090. Cf. *Evans* v. *I. T. U.*, 76 F. Supp. 881, 886–889 (S. D. Ind.); *N. L. R. B.* v. *I. T. U.*, 76 F. Supp. 895, 898–899 (S. D. N. Y.).

[26] See *California Ass'n* v. *Bldg. Trades Council*, 178 F. 2d 175 (C. A. 9); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C. A. 4); *Amalgamated Ass'n* v. *Dixie Motor Coach Ass'n*, 170 F. 2d 902 (C. A. 8).

Labor Management Relations Act to indicate * * * any intention to change the method by which unfair labor practices were dealt with under the [original Act]." *Amazon* case, 167 F. 2d at 186. Indeed, the relevant language of Sections 10 (a) through (f) of the amended Act, dealing with the procedure for the prevention of unfair labor practices, is virtually identical with that of the original Act.

Accordingly, it has been held that the authority to issue or refuse to issue an unfair labor practice complaint, which under the original Act was discretionary with the Board (see cases cited n. 12, pp. 11–12, *supra*), remains a matter of discretion under the amended Act, the only difference being that such discretion is vested in the General Counsel rather than in the Board.[27] Moreover, after a complaint has been issued, the Board still has the duty and function of determining whether unfair labor practices have been committed, what remedy would best effectuate the policies of the statute, and whether to seek enforcement of its order in the courts.[27a] As before, the Board vindicates "public" rather than "private" rights.[28] And, as under the original Act, the flexibility of the unfair labor practice provisions is paralleled by the equally

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[27] *Lincourt* v. *N. L. R. B.*, 170 F. 2d 306 (C. A. 1); *Wilke* v. *N. L. R. B.*, 15 Labor Cases, Par. 64, 799 (C. A. 4); *Gen'l Drivers* v. *N. L. R. B.*, 179 F. 2d 492 (C. A. 10).

[27a] See *N. L. R. B.* v. *Pool Mfg. Co.*, 26 L. R. R. M. 2127, 2128 (S. Ct., May 15, 1950).

[28] *Steelworkers* v. *N. L. R. B.*, 170 F. 2d 247, 266 (C. A. 7), affd., 26 L. R. R. M. 2084 (S. Ct., May 8, 1950); *N. L. R. B.* v. *Budd Mfg. Co.*, 169 F. 2d 571, 577 (C. A. 6), cert. den., 335 U. S. 908.

broad discretion which Section 9 entrusts to the Board with regard to representation matters.[29]

Congress was undoubtedly well aware that the Board, under the original Act, not only had, but frequently exercised (see pp. 12–15, *supra*), the discretion to dismiss unfair labor practice complaints for policy reasons. Thus, by substantially retaining the basic pattern of the original Act and the flexible power which it conferred upon the Board, it is to be presumed, absent other evidence, that Congress, in amending the Act, did not deprive the Board of such discretion. *N. L. R. B.* v. *Barnes Corp.,* 178 F. 2d 156, 160–161 (C. A. 7); *Queensboro Farms Products, Inc.* v. *Wickard,* 137 F. 2d 969, 977 (C. A. 2). We shall demonstrate that, contrary to the contentions of petitioner here and of the General Counsel before the Board, this presumption is entirely compatible with the final authority conferred on the General Counsel by Section 3 (d), and with Congress' intention to effect a separation of prosecutory and adjudicatory functions. Indeed, a consideration of the legislative history of Section 3 (d), the interrelation between representation and unfair labor practice proceedings, and the recent decision in the *Electrical Workers* case (*infra,* pp. 41–43) affirmatively disclose that the Board still possesses discretionary authority to dismiss an unfair labor practice complaint for policy reasons, including the reason that the interruption of an employer's operations by a labor dispute would have only a remote effect on commerce.

[29] See, e. g., S. Rep. No. 105, 80th Cong., 1st Sess., pp. 12, 25; *Mueller Brass Co.* v. *N. L. R. B.*, 180 F. 2d 402 (C. A. D. C.).

1. The language and legislative history of Section 3 (d)

Petitioner's argument that the amendments to the Act deprive the Board of its prior authority to dismiss a complaint for policy reasons rests largely on the premise that the existence of such authority is negated by Section 3 (d) (Br., pp. 13–23).[30] As previously noted (p. 21), this provision vests the General Counsel with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board."

[30] Insofar as petitioner intends to suggest, by the discussion appearing at pp. 7–12 of its brief, that the broad coverage of the Act manifests the Congressional intent that jurisdiction must be asserted over every enterprise which, as a matter of law, would come within the Act's reach, this contention is clearly untenable.

First, petitioner does not deny that, in representation cases, the Board, as it did in Case No. 36–RM–26 involving Haleston, has discretionary authority to withhold its processes even though legal jurisdiction exists (see pp. 37–39, *infra*).

Second, the language of Section 10 (b) and the cases interpreting it (see pp. 10–11, 22, *supra*), compel the conclusion that, in unfair labor practice cases as well, the exercise of jurisdiction, at least at the complaint stage, is entirely discretionary. In other words, there is no question that, under the amended Act, the General Counsel, notwithstanding the broad coverage of the Act, has discretionary authority to refuse to issue a complaint even though legal jurisdiction exists. The question is thus, not whether there is power to withhold jurisdiction which otherwise exists, but rather who may exercise this power—solely the General Counsel; or the Board as well, upon review of a complaint issued by the General Counsel.

Finally, it is common knowledge respecting administrative agencies that "unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns." *U. S.* v. *Morton Salt Co.*, 338 U. S. 632, 647–648. See also, pp. 44–45, *infra*.

The plain meaning of this language would appear to be that the Board "may no longer exercise a discretionary judgment at the beginning of an unfair labor practice proceeding"—i. e., the "General Counsel has the unfettered discretion to determine whether to issue a complaint and how to prosecute it" (R. 31). Accordingly, as the Board has recognized,[31] it cannot compel the General Counsel either to issue or refrain from issuing a complaint, or review his action in refusing to issue one.

Petitioner, however, would draw still more from the language—i. e., a limitation on the Board's decisional process. Thus it argues (Br., pp. 14–16) that the General Counsel's issuance of a complaint cannot be "final" unless the Board, when the record has been completed and the case has come to it for decision, is bound by his prosecution policy judgment that the exercise of jurisdiction would effectuate the purposes of the Act.

The flaw in this reasoning is that the Board—as petitioner does not deny—has authority to overrule the General Counsel's prosecution judgment on whether certain conduct constitutes an unfair labor practice within the meaning of the Act.[32] If a Board decision dismissing a complaint on the merits does not encroach upon the General Counsel's "final authority"

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[31] *Times Square Stove Corp.*, 79 N. L. R. B. 361, 363–366; *Columbia Pictures Corp.*, 85 N. L. R. B. No. 186, 24 L. R. R. M. 1521 (August 31, 1949).

[32] E. g., *Int'l Bro. of Teamsters* (*Conway's Express*), 87 N. L. R. B. No. 130, 25 L. R. R. M. 1202 (December 16, 1949); *Oil Workers Int'l Union* (*Pure Oil Co.*), 84 N. L. R. B. No. 38, 24 L. R. R. M. 1239 (June 17, 1949).

under Section 3 (d), why does a contrary Board decision on policy grounds?[33] Both types of decisions equally limit the discretion of the General Counsel, in the sense that they would provide a rule for self-limitation as to future charges involving similar situations. Both types of decisions, moreover, are procedurally indistinguishable. Each is predicated on the Board's basic authority to determine the issues in an unfair labor practice proceeding; each must be based upon a record duly compiled in accordance with the procedures provided by the statute; each must be accompanied by findings of fact; and each results in a setting aside of the process by which the General Counsel initiated the proceeding. In the light of these circumstances, petitioner's purported distinction is without merit.

Petitioner, at this point, retreats to the legislative history of Section 3 (d) (Br., pp. 17–23), which, rather than supporting, completely repudiates its contention. In a piece of history overlooked by petitioner, Senator Taft described the purpose of Section 3 (d) as follows (93 Cong. Rec. 6859, June 12, 1947):

> * * * In order to make an effective separation between the judicial and prosecuting functions of the Board * * * the conferees

[33] We have shown (pp. 12, 16–17, *supra*) that no distinction may properly be drawn between the Board's authority to dismiss a complaint for the policy reason of remote effect upon commerce (as in the instant case) and its authority to dismiss for some other policy reason. Under the amended Act, as under the Wagner Act (pp. 12–17, *supra*), the Board has declined to decide the merits for a variety of reasons. Cf. this case with *Sunray Oil Corp.*, 82 N. L. R. B. 942, and *Rice-Stix of Arkansas, Inc.*, 79 N. L. R. B. 1333–1334.

> created the office of general counsel of the Board, * * *. We invested in this office final authority to issue complaints, prosecute them before the Board, and supervise the field investigating and trial personnel. * * *
>
> The Board itself * * * in recent years has promulgated regulations which have delegated the power of issuing complaints to the various regional directors. * * * The present regulations permit a person aggrieved by the refusal of a regional director to issue a complaint to appeal the matter to Washington. * * * According to the testimony of the Chairman of the Board these appeals are considered by an anonymous committee of subordinate employees. *What the conference amendment does is simply to transfer this "vast and unreviewable power" from this anonymous little group to a statutory officer responsible to the President and to the Congress.* * * * [Emphasis added.]

From this statement, it is clear that the prime objective of Section 3 (d) was to transfer, from "an anonymous committee of subordinate employees" to "a statutory officer responsible to the President and to the Congress," the final decision as to whether an unfair labor practice charge should be prosecuted.

Thus Senator Taft, as well as the other spokesmen cited by petitioner (Br., pp. 20–22), intended, as the Board has recognized (p. 25, *supra*), that the General Counsel alone should determine whether a complaint is to issue. However, neither Senator Taft, nor petitioner's authorities, disclose the further intention that the General Counsel, by exercising his unre-

viewable discretion to prosecute, would limit the Board's decisional process. On the contrary, the Taft statement concludes with the observation that (93 Cong. Rec. 6859, June 12, 1947):

> So far as having unfettered discretion is concerned he [the General Counsel], of course, must respect the rules of decision of the Board and of the courts. * * *

Senator Taft repeated the same thought in the comment quoted by petitioner (Br., p. 20):

> Under this bill, the counsel will have the right to make the decision as between employer and employee; *but his decision will be subject to the judicial decision of the Board* and, above the Board, the courts * * *. [Emphasis added.]

Quite properly, Senator Taft drew no distinction between a Board decision on the merits and a Board decision on policy grounds (see pp. 25–26, *supra*). His pronouncements therefore patently indicate that the General Counsel's "final authority" under Section 3 (d) ends "once the complaint has issued and the case has been submitted to the Board for decision" (R. 31). Any action which the Board may take thereafter—whether on the merits or on policy grounds—is an exercise of its decisional power, to which the General Counsel's prosecution power is ultimately subjected.

If any further evidence were required to establish that Section 3 (d) does not preclude the Board from overriding the General Counsel's policy judgments as well as his judgments on the merits, it is afforded by the 1949 hearings on proposed amendments to the

present Act.[33a] Board Chairman Herzog, in the course of his testimony before the Senate Labor Committee, raised the very problem presented here—i. e., the conflict between the General Counsel and the Board on the assertion of jurisdiction over local enterprises. Senator Taft replied: "The time will come when you can overrule him." [34]

Similarly, in the recent hearings on the President's Reorganization Plan No. 12, which would have abolished the independent office of General Counsel, Senator Taft, in commenting on the same problem, emphasized that under the present statutory scheme: "Gradually these differences between the Board and the General Counsel, * * * will be resolved by the Board, *and of course the Board has the final word.*" [Emphasis added.] [35] He added that: "I would say that the Board should make some declaration of policy and that the General Counsel should follow that declaration of policy. Of course, he is bound to do it in the end, * * *." [36]

[33a] Cf. *Herzog* v. *Parsons,* 25 L. R. R. M. 2413, 2418 (C. A. D. C., February 20, 1950); *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 769, n. 20.

[34] *Hearings before the Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., p. 176. See also, Senator Taft's statement on the floor of Congress, 95 Cong. Rec. 8750.

[35] *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2nd Sess., p. 36.

[36] *Id.*, at 40. It should also be emphasized that this post-legislative history does more than demonstrate that the General Counsel's final authority under Section 3 (d) is subject to the Board's decisional power, including the power to dismiss cases for policy reasons. The history reveals Congressional *approval* of the Board's policy of declining jurisdiction in cases (like the

2. The doctrine of separation of functions

As a corollary to the contention that the General Counsel's "final authority" under Section 3 (d) precludes the Board from dismissing a complaint for policy reasons, petitioner asserts (Br., pp. 14, 17–19) that this result is compelled by the doctrine of "separation of adjudicating and prosecuting functions," which Congress sought to effectuate by creating the independent office of General Counsel. This contention is likewise erroneous.

According to Walter Gellhorn, Director of the Attorney General's Committee on Administrative Procedure: [37]

> The opposition to lodging in one agency the authority both to institute and to adjudicate proceedings rests on a simply stated thesis: One who resolves to maintain an action and then serves as an advocate of a particular position is incapacitated to appraise fairly and objectively the arguments advanced against the view espoused.

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one at bar) where the effect on commerce is remote, and *disapproval* of the General Counsel's contrary action of asserting jurisdiction in such cases. See *Hearings before the Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., p. 177; S. Rep. No. 99, 81st Cong., 1st Sess., p. 40; S. Rep. No. 99, Part 2, 81st Cong., 1st Sess., p. 8; *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2nd Sess., p. 35; *Hearings before the House Committee on Expenditures in the Executive Departments on H. Res. 512 and H. Res. 516*, 81st Cong., 2nd Sess., p. 109; *Hearings before the Joint Committee on Labor-Management Relations*, 80th Cong., 2nd Sess., p. 45.

[37] Gellhorn, Federal Administrative Proceedings (Johns Hopkins, 1941), p. 18.

So-called "separation of functions" attempts to overcome this objection by isolating those who perform the characteristic tasks of a prosecutor from those who perform adjudicating functions.

The characteristic tasks of a prosecutor are those of "investigation and advocacy," and of "making preliminary decisions to issue a complaint or to proceed to formal hearing in cases which later the agency heads will decide." *Final Report of the Attorney General's Committee on Administrative Procedure* (Govt. Print. Off., 1941), p. 56. The process of deciding to issue a complaint is (*Id.* at 57):

> * * * wholly comparable to what a court does in the first stage of a show cause proceeding, or in the issuance of a writ of certiorari. No decision on the merits is made; the court, or the [prosecuting arm of the agency], merely concludes that the situation warrants further examination in formal proceedings. *The ultimate judgment of the agency heads need be no more influenced by the preliminary authorization to proceed than is the ultimate judgment of a court by the issuance of a temporary restraining order* pending a formal hearing for a permanent injunction. [Emphasis added.]

Thus, to achieve the intent of the amended Act to "separate" the functions of prosecution and adjudication, it is necessary to construe the General Counsel's "final authority" as encompassing only these tasks. This is precisely what the Board has done (p. 25, *supra*) in giving the General Counsel free rein with respect to the investigation of unfair labor practice charges, the determination as to whether a com-

plaint should issue, and the conduct of the prosecution.

If, as petitioner contends, the issuance of a complaint by the General Counsel must, in addition, limit the Board's decisional process (so that it is precluded from dismissing on policy grounds), this result, far from being compelled by the doctrine of separation of functions, is repugnant to the doctrine. The prosecutor's "preliminary authorization to proceed," instead of being a mere conclusion "that the situation warrants further examination in formal proceedings," would influence the result of the formal proceeding. In short, the prosecutory arm, rather than being confined to the characteristic tasks of a prosecutor, would thus be vested with adjudicatory power.

To the extent that petitioner by its separation argument intends to urge, as did the General Counsel before the Board, that Congress went beyond separating functions within an administrative agency—i. e., it transformed the Board into a court—petitioner is on equally fallacious grounds. Essentially this argument reduces to the following syllogism: (1) a court is under a duty to exercise its power in every case brought by the public prosecutor; (2) the amended Act, by creating an independent prosecutor (the General Counsel), leaves the Board with only the judicial power of a court; (3) therefore the Board is under a duty to exercise its power in every case brought by the General Counsel.[38]

[38] Cf. the brief which the General Counsel submitted to the Board in this case. A copy of this brief, which was incorporated in the General Counsel's request for review of the

Assuming *arguendo* that a court cannot decline to exercise its jurisdiction for policy reasons, the assumption implicit in the minor premise—i. e., Congress, by leaving the Board with only adjudicatory power, thereby made it a court—is supported by neither the text nor the legislative history of the amended Act. We have already shown (pp. 22–23, *supra*) that the Board still adjudicates "public" rather than "private" rights, and is still guided by the policies of the Act in fashioning unfair labor practice remedies, in deciding whether to enforce them, and in handling representation cases.[39] These are the indicia of an administrative agency rather than of a court (see pp. 35–36, *infra*).[40]

Moreover, Senator Taft, in the comments quoted by petitioner (Br., pp. 19–20), stated that the amendment to the Act by Section 3 (d):

> accomplishes separation of functions *within the framework of the existing agency* * * *.
>
> All that we have done with the Board * * * is to make a separation of powers. *Under this bill the Board is judicial. It is judicial today* [under the Wagner Act] * * *. [Emphasis added.]

Trial Examiner's dismissal order (R. 21–23), is included in the full transcript of record filed with the Court.

[39] As under the original Act, the Board is also vested with rule-making power. See Section 6, and the proviso to Section 8 (a) (2).

[40] Cf. the distinction drawn by Chairman Herzog between the Board and the Tax Court. *Hearings before the Senate Committee on Expenditures of The Executive Departments on S. Res. 248*, 81st Cong., 2d Sess., p. 141.

This is borne out by Section 3 (a) which provides that: "The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is *hereby continued as an agency of the United States* * * *." [Emphasis added.] Similarly, Section 3 (d) establishes a "General Counsel *of the Board,*" and confers upon him "final authority, *on behalf of the Board.*" [41]

In the face of this evidence, it is apparent that the amended Act, rather than changing the fundamental nature of the agency, retains its status as an administrative body, combining within its framework prosecuting and adjudicatory functions which are now performed in isolation from each other. Whereas before, in the handling of unfair labor practice cases, the National Labor Relations Board was an administrative agency with both prosecuting and adjudicatory functions lodged in the Board members, it is now one in which only the latter functions are vested in the Board members. The Board members, in the performance of their present functions in unfair labor practice cases, act in a "quasijudicial" capacity just as they did in performing these same functions under the Wagner Act (see pp. 12, 16–17, *supra*). For these reasons, the Hoover Commission has grouped the National Labor Relations Board, along with the Federal Trade Commission, as an "independent regulatory commission." [42]

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[41] Cf. the recent amendments to the *Memorandum Describing Statutory and Delegated Functions of the General Counsel*, 15 F. R. 1088–1090.

[42] *Task Force Report on Regulatory Commissions* [*Appendix N*], prepared for the Commission on Organization of the Executive Branch of the Government (Govt. Print. Off., 1949),

There is a significant difference between a court and an administrative agency with "quasi-judicial" power. This difference has been articulated as follows:[43]

> [Administrative agencies] do more than judicially and impartially apply the law as they find it to a controversy between private parties; they are charged with the carrying out of definite policies involving discretion and the formulation of subordinate policies to effectuate the purpose of the laws which they administer. The courts, on the other hand, take the law as they find it without any particular obligation to accomplish a particular public purpose or secure a certain result. Administrative bodies are policy-determining and policy-effectuating bodies, while the courts merely construe and apply the laws.

Similarly, the Hoover Commission noted that:[44]

> * * * each of the commissions is largely engaged in making policies and defining standards of conduct within the framework of the statute. In great part, this is carried on through quasi-judicial procedures, but it *involves more than adjudications of a court.* In making decisions or regulations defining a

pp. 3, 10–11. Senator Taft, in his comments on Reorganization Plan No. 12, also described the National Labor Relation Board as a "regulatory commission," adding: "Its function is not so much the trial of cases; it does not depend so much on a lot of facts disputed vigorously on both sides; it depends rather on an *administrative study* of the entire problem" (emphasis added). 96 Cong. Rec. 6963 (May 11, 1950).

[43] Pillsbury, "Administrative Tribunals," 36 Harv. L. Rev. 405, 423.

[44] *Task Force Report on Regulatory Commissions, op. cit.*, p. 11.

> standard of conduct, prescribing a duty, or granting a privilege, *the commission must act in the light of* the conditions in the industry and *the statutory objectives.* [Emphasis added.] [45]

The rationale for the distinction is that courts, unlike administrative agencies, are usually provided with no standard for selecting on policy grounds between those rights which they should, and should not, enforce.[46] In Section 1 of the Act (p. 37, *infra*), on the other hand, Congress provided the Board with standards for making that precise selection.

To sum up: The separation of functions effected by Congress in the amended Act did not destroy the Board's status as an administrative agency. Discretionary authority to effectuate "the policy of a public statute is the hallmark of the administrative process, [and] is [the] very characteristic which distinguishes an administrative agency from a court of law" (R. 29). Consequently, judicial analogies are inapposite and do not in any way impair the correctness of the conclusion that the Board has power to dismiss unfair labor practice complaints for policy reasons.

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[45] See also, Chamberlain, *The Judicial Function in Federal Administrative Agencies* (The Commonwealth Fund, 1942), p. 55; *Report of the Committee on Ministers' Powers* (1932, Cmd. 4060), quoted in Stason, *Cases and Other Materials on Administrative Tribunals* (Callaghan, 1947), pp. 64, 68; Davis, *Official Notice,* 62 Harv. L. Rev. 537, 538, 549.

[46] Where, however, there is a "recognized public policy or defined principle guiding the exercise of the jurisdiction conferred" which would warrant its nonexercise, even a court may decline to assert its jurisdiction. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234–235. And cf. 28 U. S. C. A. Sec. 1254, defining the discretionary certiorari jurisdiction of the Supreme Court. Accordingly, the major premise of the syllogism (p. 32, *supra*) is likewise invalid.

3. *The interrelation between unfair labor practice and representation proceedings*

Consideration of the interrelation between unfair labor practice and representation proceedings furnishes additional evidence that Congress, in amending the Act, could not have intended to deprive the Board of discretionary authority to dismiss a complaint for policy reasons.

A representation proceeding under Section 9 of the Act and an unfair labor practice proceeding under Section 10 are complementary tools given to the Board for the effectuation of the purposes of the Act. Thus the preamble to the statute, in reciting these purposes, states (Section 1, last paragraph):

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedures of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. [Emphasis added.]

The unity between the two types of proceedings is further shown by the fact that it is an unfair labor practice under Section 8 (a) (5) for an employer to refuse to bargain collectively with the majority representative determined under Section 9. In this situation, "the unit proceeding and [the] complaint

on unfair labor practices are really one." *Pittsburgh Plate Glass Co.* v. *N. L. R. B.,* 313 U. S. 146, 158. Accordingly, Section 9 (d) provides that, where the Board's determination in a representation proceeding forms the basis of a final order entered in an unfair labor practice proceeding, both determinations shall be judicially reviewed at the same time. See *A. F. of L.* v. *N. L. R. B.,* 308 U. S. 401.

Petitioner does not question that under the amended Act, as under the old Act, the Board is empowered to dismiss representation petitions on policy grounds.[47] Indeed, it assumes the propriety of the Board's action in the prior representation case involving Haleston, wherein the Board dismissed the representation petition for the very same policy reason assigned in the instant complaint proceeding. In view of the above-described interrelation between complaint and representation proceedings, anomalous results, obviously not intended by Congress, would occur if the amended Act, while leaving the Board power to dismiss a representation petition for policy reasons, at the same time took from it the complementary power to dismiss a complaint for identical reasons.

For example, the Board's authority under Section 9 to determine questions concerning representation may be invoked either by a petition filed pursuant to that section or by a complaint alleging refusal to bar-

[47] See *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485, 492–493; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 770; *S. & R. Baking Co.*, 65 N. L. R. B. 351; *Hom-Ond Food Stores, Inc.*, 77 N. L. R. B. 647; *N. L. R. B., Twelfth Annual Report* (Govt. Print. Off., 1948), pp. 7–14.

gain under Section 8 (a) (5) or 8 (b) (3).[48] If the Board may exercise its discretion to dismiss the representation petition but not to dismiss the complaint, this dilemma is presented: Either the discretion conceded to exist with respect to representation petitions is illusory, or the parties are made subject to the liabilities of the Act without necessarily being entitled to resort to its peaceful procedures whereby the unfair labor practices alleged in the complaint might have been avoided. It is inconceivable that Congress intended so manifest an inequity,[49] or that it sought to permit such divergent results to turn on the nature of the proceeding to determine the bargaining representative.

Similarly, such inequity would be present in the instant case if the Board were without power to dismiss the complaint on policy grounds. The complaint here alleged (R. 5–11) that, by insisting upon a union-shop provision not authorized under Section 9 (e) of the Act, the Union was engaging in an unfair labor practice within the meaning of Section 8 (b) (2). But, since the Board presumably has the same discretion with respect to Section 9 (e) petitions for

[48] Section 8 (a) (5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9 (a)*. Section 8 (b) (3) provides that it shall be an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, *provided it is the representative of his employees subject to the provisions of section 9 (a)*." [Emphasis added.]

[49] Where, for strong policy reasons, Congress has intended parties to be subject to the liabilities of the Act without being entitled to invoke its protection, it has stated that intention in unmistakable terms—Sections 9 (f), (g) and (h) of the amended Act as compared with the subdivisions of Section 8 (b).

union-shop elections as it has with respect to Section 9 (c) petitions for representation elections, it would have refused to entertain the union's petition under Section 9 (e) for the same policy reason as it dismissed the prior representation petition.[49a] Accordingly, unless the Board had power to complement its dismissal of the representation petition with an equivalent dismissal of the complaint, the Union would be subject to the liabilities of the Act without being accorded the opportunity, provided in Section 9 (e), of avoiding them.[50]

Again, certification of a union as collective bargaining representative of employees operates to insulate that union against certain types of unfair labor practice charges and to create liabilities in rival unions for adopting certain forms of economic pressure against it.[51] The power to dismiss a petition for certification on policy grounds, unaccompanied by the

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[49a] See *Construction Materials Co.*, 14–UA–3074. The formal file of this case records the fact that, on October 28, 1949, the Board sustained the Regional Director, who had dismissed the union shop election petition on the ground that the Board had, in a prior representation case involving the same company (14–RC–577, 85 N. L. R. B., No. 63), declined jurisdiction for policy reasons.

[50] A similar incongruity is presented by an 8 (b) (2) charge involving labor organizations in the building construction industry, where, because of unstable employment relations, there is no suitable administrative machinery for conducting Section 9 (e) union shop elections. The General Counsel has attempted to forestall this incongruity by doing the very thing which both he and petitioner would preclude the Board from doing in the instant case—i. e., he has declined, for policy reasons, to issue complaints based on 8 (b) (2) charges arising in the building and construction industry. See 25 L. R. R. M. 107–109 (December 26, 1949).

[51] See *General Box Co.*, 82 N. L. R. B. 678, 680–682.

equivalent power in respect to complaints, would discriminate against a union whose petition had been so dismissed. Through no fault of its own, this union, unlike another union which was successful in obtaining certification, could not engage in secondary pressure to compel recognition without running the risk of incurring a sanction for violating Section 8 (b) (4) (B) of the Act.

Apart from the anomalies already described, a further absurdity would occur if the Board were without power to dismiss a complaint for policy reasons. The Board, although it has a valid policy for not proceeding, would have to go to the expense and time of deciding the case on the merits and issuing an order. Then it could render all this futile, and give effect to its original policy, by refusing to seek enforcement of the order. Under the amended Act, as under the Wagner Act, the permissive language of Section 10 (e) vests the Board with complete discretion to determine whether to initiate enforcement proceedings (see pp. 10–11, 21–22, *supra*).

4. *The Electrical Workers case*

The recent decision of the Second Circuit, in *Int'l Bro. of Electrical Workers* v. *N. L. R. B.*,[52] corroborates the overwhelming evidence thus far presented by expressly recognizing that, under the amended Act, the Board has power to dismiss a complaint for the reason that the activities involved have only a remote effect on commerce. In that case, the Board had found that the union, by picketing a building site where both union and nonunion subcontractors were working, vio-

[52] 181 F. 2d 34 (February 24, 1950).

lated Section 8 (b) (4) (A) of the Act. The union, in defending against the Board's order, argued that (181 F. 2d at 36) "even though the Board had jurisdiction in the sense that [the union's] act 'affected' commerce, the occasion was too trivial to justify intervention, * * *."[53] Judge Learned Hand, speaking for the Court, rejected this contention on the ground that it was for the Board, not the courts, to decide whether a "situation" was important enough to warrant its intervention. He added that, if a court had power to set aside such a Board determination, it could do so only when the Board had been "frivolous beyond rational question" (see pp. 52–53, *infra*), which was not true here.

The holding of Judge Hand necessarily presupposes that the Board, under the amended Act, has power to dismiss an unfair labor practice complaint for the reason that the business involved does not significantly affect commerce. Otherwise, the short answer to the union's contention in the *Electrical Workers* case would have been that the Board lacked authority to decline jurisdiction on the ground proposed. That is, unless the Board possessed the authority in question, it would have been pointless to suggest, as Judge Hand did, that, if the Board's assertion of jurisdiction was "frivolous beyond rational question," the court could have set it aside. Similarly, there would have been no need to review the Board's determination, as

[53] It is clear that this argument was addressed to the *Board's* action in affirming the General Counsel's assertion of jurisdiction, rather than to the General Counsel's action in initiating the proceeding.

Judge Hand proceeded to do, and conclude that "the case at bar was certainly within the area of fair differences of opinion, which we must not invade" (181 F. 2d at 36).[54]

Point II

The Board's conclusion that petitioner's business bears only a remote and insubstantial relation to commerce is not subject to judicial review

We submit that, were this Court to conclude, as we have shown (pp. 9–43, *supra*), that the Board had statutory authority to make the policy judgment here involved, judicial review should thereupon end. The further question of whether the Board was reasonable, in deciding upon the facts of this case that petitioner's business was too unimportant in relation to interstate commerce to warrant the assertion of jurisdiction, lacks "satisfactory criteria for a judicial determination" (*Coleman* v. *Miller*, 307 U. S. 433, 454–455), and is therefore not a proper subject for court scrutiny.

It is no longer disputed that the Act confers upon the Board a "vast range of jurisdiction," which encompasses "untold small enterprises." *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 782–783.[55] Accordingly, the courts, including this Court, have sustained Board orders

[54] Cf. *N. L. R. B.* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68 (C. A. 10, January 3, 1950).

[55] See also, *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601; *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318; *Polish Nat'l Alliance* v. *N. L. R. B.*, 332 U. S. 643, 648.

directed to retail businesses and other operations which "in isolation might be viewed to be merely local" (*Ibid.*).[56]

Such "vast range of jurisdiction," however, raises practical problems of budget and administration. Through the years the Board has, in any one period, received many more cases than it and its limited staff have been able to dispose of, with the result that a huge backlog of undecided cases has been built up.[57] This condition has, from time to time, been aggravated by Congressionally imposed, drastic cuts in Board appropriations.[58] Even at the end of the 1948–1949 fiscal year, a period in which the Board closed a tremendous

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[56] *N. L. R. B.* v. *Van DeKamp's Holland-Dutch Bakers, Inc.*, 152 F. 2d 818, 819 (C. A. 9); *Brandeis & Sons* v. *N. L. R. B.*, 142 F. 2d 977, 981 (C. A. 8); *N. L. R. B.* v. *Suburban Lumber Co.*, 121 F. 2d 829, 832–833 (C. A. 3); *N. L. R. B.* v. *Schmidt Baking Co., Inc.*, 122 F. 2d 162, 163 (C. A. 4). *United Bro.* v. *Sperry*, 170 F. 2d 863 (C. A. 10); *Int'l Bro.* v. *N. L. R. B.*, 181 F. 2d 34 (C. A. 2, February 24, 1950).

[57] *N. L. R. B. Twelfth Annual Report* (Govt. Print. Off., 1948), Table 1, p. 83; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 783.

[58] Thus, in its *Eleventh Annual Report* (Govt. Print. Off., 1947) the Board noted (p. 6):

"At the close of the fiscal year ending June 30, 1946, 4,605 cases were still pending before the Board, * * *. Never before in its history did the Board enter a new fiscal year with so great a backlog. * * * In view of the dynamic nature of the field in which the Board operates, it is of prime importance to both employers and employees that such cases be considered and adjudicated as rapidly as possible, * * *. Considered in this connection, a matter of grave concern to the Board is the deep cut made in its appropriations for the fiscal year beginning July 1, 1946, which necessitated the separation of over 20 percent of its personnel."

total of 32,796 cases, a backlog of 5,722 cases remained on the docket.[59]

If the Board were to assert jurisdiction over every local business nominally covered by the Act, it would do so at the expense of delaying action in other cases with a far greater impact on commerce, which compete for the same limited budget and staff. To utilize these fixed resources in the manner which will best effectuate the policies of the Act, the Board, therefore, cannot exercise the full measure of its legal jurisdiction, but must differentiate between cases it will entertain on the basis of the size and type of business involved and the impact on commerce.[60] In general, jurisdiction is asserted in those cases which, in relation to the entire case-load, present the most serious threat to commerce, while it is withheld in those where that threat is least severe. Because both case-load and budget vary from time to time, however, cases which, at one period, warrant an assertion of jurisdiction may not warrant it at another periods, and *vice versa*.

In short where, as here, the question of whether the assertion of jurisdiction would effectuate the policies of the Act turns solely on the relation of the business to commerce,[61] resolution of that question involves a

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[59] *Fourteenth Annual Report* (Govt. Print. Off., 1950). p. 1.

[60] Cf. *U. S.* v. *Morton Salt Co.*, 338 U. S. 632, 647–648; *Task Force Report on Regularity Commissions* [Appendix N], prepared for the Commission on Organization of the Executive Branch of the Government (Govt. Print. Off., 1949), p. 41.

[61] The cases cited pp. 12–14, 15, n. 19, 26, n. 33, *supra*, reveal that this question may turn on other considerations.

determination as to what constitutes the best allocation of the Board's funds and personnel. This is illustrated by Chairman Herzog's statement in the *Liddon White* case,[62] where, in dissenting from the majority's assertion of jurisdiction over a retail automobile dealer, he warned (at 1185):

> An agency that received 12,500 new cases in the most recent 6-month period and closed its books on March 1 with 9,500 cases pending ought not, * * * to embark upon a search for new fields to conquer. There is more than enough to do. We believe that it would be better for the Board to concentrate attention upon expediting action on cases in important industries, rather than dissipate its energies upon matters that would normally be the concern of the States. * * *

Similarly in his recent testimony on Reorganization Plan No. 12, Chairman Herzog stated:[63]

> The present General Counsel insists that this agency should seek to regulate the labor relations of any and every enterprise whose activities affect interstate commerce in the constitutional sense, no matter how remotely. * * *
>
> The Board members, on the other hand, have declined to reach out to take most such operations on the ground that they are essentially local in character * * *. *The Board believes that budgetary limitations, as well as the need to avoid diffusion of its time and energy,*

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[62] *Liddon White Trucks Co., Inc.*, 76 N. L. R. B. 1181.

[63] *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2nd Sess., p. 120.

justify it in not exerting its jurisdictional authority up to the legal hilt. * * * [Emphasis added.] [64]

That allocation of funds and personnel is involved is further illustrated by the fact that hotel and restaurant officials, who were opposed to General Counsel Denham's policy of asserting jurisdiction over essentially local businesses, lodged their objection with the House Committee on *Expenditures in the Executive Departments,* and in the course of its hearing the following colloquy occurred between Congressman Gwinn and the General Counsel: [65]

> Mr. GWINN. Now, you have a certain amount of confusion that is pretty apparent here. Would it not be sensible to continue the same rulings that have been applied until we have time to redefine what commerce is and what affects commerce?
>
> Mr. DENHAM. My job is to take the law as it is written and apply it as I understand it to be.
>
> Mr. GWINN. You will never be able to apply it; *you will not have enough machinery to do it. Congress will have to meet in extra session to give you more appropriations, more personnel.* [Emphasis added.]

It is well settled that it "is not the function of [a] court to inquire into the propriety of expenditures by the National Labor Relations Board of funds ap-

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[64] See also Chairman Herzog's dissent in *Jacob Schneider Pattern Works*, 64 N. L. R. B. 787, 790, and his testimony before the Joint Committee on Labor Management Relations. *Hearings before the Joint Committee on Labor Management Relations*, 80th Cong., 2nd Sess., Part 2, pp. 1120–1121, 1148–1149.

[65] A transcript of this hearing is contained in *Hearings before the Joint Committee on Labor-Management Relations*, *supra*, Part 1, pp. 11–41. The colloquy occurs Id., at 29.

propriated to its use by the Congress." *N. L. R. B.* v. *Nat'l Tool Co.,* 139 F. 2d 490 (C. A. 6).[66] The reason for this holding is, in part, Congress' intention that the use of appropriations be subject to legislative rather than judicial control. Such intention has been manifested by the creation of the General Accounting Office, with provision for reports by the Comptroller General to Congress respecting every expenditure or contract made by any department or agency in violation of law.[67]

An equally compelling reason for judicial abnegation is that, as the courts have themselves recognized, agency financial matters, like political questions and the conduct of foreign affairs,[68] involve considerations as to "which the judiciary has neither aptitude, facilities nor responsibility * * *." *C. & S. Air Lines* case, 333 U. S. at 111. Decisions respecting such matters, lacking "satisfactory criteria for a judicial determination" (*Coleman* v. *Miller,* 307 U. S. at 454–455), are not judicial but "essentially legislative or

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[66] See also, *N. L. R. B.* v. *Thompson Products*, 141 F. 2d 794, 797–799 (C. A. 9); *N. L. R. B.* v. *Elvine Knitting Mills, Inc.*, 138 F. 2d 633, 634 (C. A. 2); *S. H. Camp & Co.* v. *N. L. R. B.*, 160 F. 2d 519, 521 (C. A. 6). This rule necessarily applies to nonexpenditures as well, because the question of whether it was proper not to use funds for a particular purpose can usually be answered only after inquiry into the relative merits of the alternative purposes for which these funds were spent.

[67] *Budget and Accounting Act*, 1921, Sec. 312 (c) (42 Stat. 20, 31 U. S. C. Secs. 71 *et seq.*). See also, *Task Force Report on Regulatory Commissions* [*Appendix N*], *op. cit.*, pp. 15–16, 37.

[68] *Coleman* v. *Miller*, 307 U. S. 433, 454–456, and cases cited therein; *C. & S. Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111–112. Cf. *Perkins* v. *Lukins Steel Co.*, 310 U. S. 113, 127–28.

administrative." *Fed'l Radio Commn.* v. *Gen'l Electric Co.,* 281 U. S. 464, 469. The requirement of "case or controversy" in Article III of the Constitution, as well as due regard for the doctrine of separation of powers, thus preclude "constitutional courts" from entering this realm.[69]

The exercise of the Board's discretion in the instant case, being intimately entwined with the question of how the Board is to use its funds and personnel, it follows that the Board's decision is not cognizable by this Court. Cf. *Int'l Bro. of Electrical Workers* v. *N. L. R. B.,* 181 F. 2d 34, 36 (C. A. 2, February 24, 1950). If any review is to be made, it is exclusively within the province of the legislative branch to exercise such function.[70]

Point III

In any event, there is rational basis for the Board's declination of jurisdiction over petitioner's business

The Board's conclusion that petitioner's operations were essentially local, and therefore only remotely affected commerce, was based on the facts that "the Employer operates a chain of retail drug stores in Portland, Oregon, making substantial out-of-State purchases but selling all its merchandise locally" (R. 25). The Board added (R. 26): "Retail drug

[69] See *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *Fed'l Radio Commn.* v. *Gen'l Electric Co.*, 281 U. S. 464.

[70] That Congress approves of the Board's refusal to use its funds in cases like the instant one, where the effect on commerce is remote, see n. 36, pp. 29–30, *supra.*

stores are essentially local operations, and in such cases we have frequently declined to assert jurisdiction where the only factor in favor of doing so was a substantial volume of out-of-State purchases."

There can be little question that a retail store or a chain of retail stores, wholly confined to one State and selling all of its merchandise locally, falls in the category of an "essentially local operation."[71] It is equally clear that a stoppage of such store's business by a labor dispute may have a varying impact on interstate commerce. For example, the impact would be least where the store made no out-of-State purchases, obtaining all of its supplies locally; greater where the store received supplies from out-of-State; and greatest where out-of-State purchases were coupled with local sales to industrial concerns, themselves directly engaged in commerce.

With respect to the local retail stores described, the Board has concluded that, at the present time, it can, consistent with the demands of other industries, assert jurisdiction only in those cases which present the greatest threat to interstate commerce. Accordingly,

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[71] Thus, under the compact which the National Labor Relations Board entered into with the New York State Labor Relations Board (set forth in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 795), it was agreed that:

"Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, * * *:

1. Retail stores,

* * *

8. Other obviously local businesses."

not only in cases involving retail drug stores,[72] but in those involving retail bakery, dairy, and clothing stores,[73] the Board has refused jurisdiction where, as here, the immediate pinch on interstate commerce would be solely the stoppage of out-of-State purchases. On the other hand, the Board has asserted jurisdiction where this factor, in combination with additional factors, would render the interference with commerce more severe.[74]

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[72] In addition to the instant case, see *Jacobs Pharmacy, Inc.*, 87 N. L. R. B. No. 34, 25 L. R. R. M. 1101; *Caneer* v. *Retail Clerks Assn.*, 25 L. R. R. M. 2404 (Cal. Superior Ct., January 31, 1950).

[73] E. g., *Sta-Kleen Bakery, Inc.*, 78 N. L. R. B. 798; *Fehr Baking Co.*, 79 N. L. R. B. 440; *Purity Creamery Co.*, 79 N. L. R. B. 1042; *Creamland Dairy, Inc.*, 80 N. L. R. B. 106; *Bailey Slipper Shop, Inc.*, 84 N. L. R. B. No. 41, 24 L. R. R. M. 1260 (June 17, 1948); *Squires, Inc.*, 88 N. L. R. B. No. 2, 25 L. R. R. M. 1280 (January 6, 1950); *Morris C. Lebowitz d/b/a Joseph's*, 88 N. L. R. B. No. 3, 25 L. R. R. M. 1279 (January 6, 1950); *Ann Francis Millman d/b/a Fashion Fair Shops*, 88 N. L. R. B. No. 264, 25 L. R. R. M. 1525 (March 29, 1950).

[74] E. g., *Sun Ray Drug Co.*, 87 N. L. R. B. No. 32, 25 L. R. R. M. 1101, November 22, 1949 (stores part of a multi-state chain); *Collins Baking Co.*, 83 N. L. R. B. No. 88, 23 L. R. R. M. 1104, May 13, 1949 (stores affiliated with a company controlling other bakeries in numerous States); *Indianapolis Cleaners*, 87 N. L. R. B. No. 75, 25 L. R. R. M. 1141, December 8, 1949 (substantial services to customers engaged in interstate commerce); *Panaderia Sucesion Alonso*, 87 N. L. R. B. No. 108, 25 L. R. R. M. 1146, December, 1949 (Puerto Rican bakery).

The automobile dealer cases cited by petitioner (Br., p. 11) fall in this category. There the additional factor, which has prompted the assertion of jurisdiction, is the fact that the retail dealer is part of a nation-wide franchise system of distribution. See *N. L. R. B.* v. *Townsend*, No. 12362 in this Court. In any event, it does not follow that, because the Board has asserted jurisdiction over retail automobile dealers, it is arbitrary

Insofar as the retail drug industry is concerned, any other course would make it virtually impossible for the Board to limit the number of drug store cases which it will entertain. Statistics concerning the purchasing habits of retail drug chains—both those which, like petitioner, are wholly in one state, and those which are multistate—reveal that they procure the bulk of their supplies directly from manufacturers.[75] Since the drug manufacturing industry is concentrated in a relatively few parts of the country,[76] it follows that almost every retail drug chain makes out-of-State purchases. Consequently, if, as is presently true, the Board is unable to handle every case involving retail drug chains, and must therefore differentiate among them on the basis of their impact on commerce, it is necessarily required to employ criteria other than out-of-State purchases.

If the propriety of the Board's declination of jurisdiction in this case is reviewable (cf. pp. 43–49, *supra*), the standard applicable is that suggested by Judge Learned Hand in *Int'l Bro. of Electrical Workers* v. *N. L. R. B.*[77] There, in passing upon the union's contention that, because of the local nature of the business involved, the Board abused its discretion

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in declining jurisdiction over retail drug stores. Cf. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 665–666; *Currin* v. *Wallace*, 306 U. S. 1, 14.

[75] See *Sources of Chain-Store Merchandise*, S. Doc. No. 30, 72d Cong., 1st Sess., p. 12, Table 4.

[76] See *Report of the Drug, Medicine and Toilet Preparations Industry*, prepared for Industry Committee No. 19 (U. S. Dept. of Labor, Wage & Hour Division, January 1941) p. 9, Table 4.

[77] 181 F. 2d 34 (C. A. 2, February 24, 1950), discussed pp. 41–43, *supra*.

in asserting jurisdiction, Judge Hand stated (181 F. 2d at 36):

> We should hesitate to say that we could have power ever to review the Board's action because we thought the situation was unimportant; but we need not now decide more than that, *if there may be such situations, they must be frivolous beyond rational question,* and that the case at bar was certainly within the area of fair differences of opinion, which we must not invade. [Italics added.]

In the light of the considerations set forth above, clearly the Board, in declining jurisdiction over petitioner's operation, was not "frivolous beyond rational question." Moreover, the decision reached by the Board was "certainly within the area of fair differences of opinion." Accordingly, this Court may not substitute its judgment for that of the Board.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the relief requested by petitioner be denied.

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JUNE 1950.

APPENDIX

The revelant provisions of the original National Labor Relations Act (49 Stat. 449, 29 U. S. C. Secs. 151, *et seq.*), and of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 141, *et seq.*), are as follows:

Key to Comparison

Portions of the National Labor Relations Act which have been eliminated by the Labor Management Relations Act are enclosed in black brackets; provisions which have been added to the National Labor Relations Act are in italics; and unchanged portions of the National Labor Relations Act are shown in roman.

National Labor Relations Act

[AN ACT]

[To diminsh the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.]

FINDINGS AND POLICIES

SECTION 1. The denial by *some* employers of the right of employees to organize and the refusal by *some* employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strike or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * * * *

(10) The term "National Labor Relations Board" means the National Labor Relations Board [created by] *provided for in* section 3 of this Act.

* * * * *

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) [There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except] *The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President, by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting* that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) *The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise.* A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and [two] *three* members of the Board shall, at all times, constitute a quorum [.] *of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.* The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other

duties as the Board may prescribe or as may be provided by law.

SEC. 4. (a) Each member of the Board *and the General Counsel of the Board* shall receive a salary of [$10,000] *$12,000* a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint [without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended,] an executive secretary, and such attorneys, examiners, and regional directors, and [shall appoint] such other employees [with regard to existing laws applicable to the employment and compensation of officers and employees of the United States,] as it may from time to time find necessary for the proper performance of its duties. [and as may be from time to time appropriated for by Congress.] *The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations.* The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, [(or for statistical work), where such service may be obtained from the Department of Labor,] *or for economic analysis.*

* * * * *

SEC. 6. [(a)] The Board shall have authority from time to time to make, amend, and rescind, *in the manner prescribed by the Administrative Procedure Act*, such rules and regulations as may be necessary to carry out the provisions of this Act. [Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.]

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*

UNFAIR LABOR PRACTICES

SEC. 8. (*a*) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, [(a)] an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in [the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712, as amended from time to time, or in any code or agreement approved or prescribed thereunder,] any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in *section 8* (*a*) of this Act as an unfair labor practice) to require as a condition of employment membership therein *on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later*, (*i*) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; *and* (*ii*) *if, following the most recent election held as provided in section 9* (*e*) *the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization* (*A*) *if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or* (*B*) *if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;*

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(*b*) *It shall be an unfair labor practice for a labor organization or its agents*—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer [.] *and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.*

(b) The Board shall decide in each case whether, in order to [insure] *assure* to employees the [full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act,] *fullest freedom in exercising the rights guaranteed by this Act*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor orgnization shall be certified as the representative of employees in a bargaining unit of guards if*

such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.]

(1) whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under [sub] section [s] 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the

employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

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PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power [shall be exclusive, and] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, [code,] law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.*

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.* Any such complaint may

be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. [In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.] *Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).*

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon [all] *the preponderance of* the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.* Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon [all] *the preponderance of* the testimony taken the Board shall *not* be of the opinion that *the* [no] person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended*

order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the *United States* Court of Appeals [of] *for* the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the [Supreme] *District* Court of the *United States for the* District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board [as to the facts,] *with respect to questions of fact* if supported by *substantial* evidence[,] *on the record considered as a whole* shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings and to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which[,] *findings with respect to questions of fact* if supported by *substantial* evidence, *on the record considered as a whole* shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be

exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the *United States* Court of Appeals [of] *for* the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; [and] the findings of the Board [as to the facts,] *with respect to questions of fact* if supported by *substantial* evidence[,] *on the record considered as a whole* shall in like manner be conclusive.

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